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SUITS AGAINST PUBLIC OFFICERS FOR OFFICIAL MISCONDUCT—LAW
GIVING RIGHT TO BE IDEMNIFIED BY MUNICIPALITY UNCONSTITUTIONAL.

In the recent case of *In re Jenson*, 60 N. Y. Supp. 933, the Supreme Court of New York declares the Ahern Act to be unconstitutional because it provides retrospectively for alleged claims against the municipality and authorizes taxation for purposes not public in their nature. This act in substance provided for the defrayal of expenses of legal proceedings paid or incurred by certain officers and officials of the state and of the cities and counties thereof, and enabling them to obtain a reimbursement, either from the city, county or state treasury, as the case may be, for reasonable counsel fees and expenses paid or incurred in any trial or proceeding to remove from office, or any prosecution for a crime alleged to have been committed in the performance of official duties, or in connection therewith, in which trial or proceeding the prosecuted officer had been successful. The act also provided for the levying of a tax to meet such reimbursements.

It has long since been well settled that the taxing power can be exercised only to raise money for a purpose that in some sense at least can be said to be public. *Loan Asso. v. Topeka*, 20 Wal. 655. In the present case, the court in deciding that the levy of a tax to meet such reimbursements was not one for a public purpose, takes into consideration the novelty of the idea and the fact that courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal, and concludes that never yet has a purpose of this character been included among the objects for which taxes have been customarily levied.

It has never been deemed essential that claims against the state or municipality bear a legal character, but the same, if supported by a moral obligation and founded in justice, where the power exists to create them but the proper statutory proceedings are not strictly pursued or for any reason are informal or defective, may be legalized by the legislature, and enforced, either against the state itself or any of its political divisions, through the judicial tribunals. The justness of this proposition is obvious. But in the case under review, it is difficult, if not impossible, to find any obligation whatever, legal, equitable, or moral, on the part of the state or any of its municipalities, to make such reimbursement, and such payment would therefore be open to the objection of being a mere gratuity.

The courts have at all times been open to private individuals to recover any damages incurred by reason of a prosecution against them, whenever they are able to establish all of the elements essential to an action for malicious prosecution. Even in case of established innocence, the views which have thus far prevailed have been that he who is criminally prosecuted with apparently good cause must bear the burden of his own defense, as a part of the price he pays for the protective influences of our institutions of government. This sense of hardship has never been regarded as raising an equitable claim against the state for a reimbursement on the part of any acquitted defendant, generally in criminal cases, and it is impossible to perceive any distinction in favor of officers prosecuted for official misconduct which should give rise to a moral obligation in their case not existing in favor of non-official defendants.

The court, in the opinion handed down, makes reference to, but does not decide, the fact that it may be that purely prospective legislation announcing the intention of the state to pay such expenses incurred in future cases would be deemed expressive of a public purpose, and that the assurance thus given might be regarded as creating such an obligation as to relieve the subsequent payment from the objection that it was a mere gratuity.

VICE-PRINCIPAL—CONDUCTOR OF A FREIGHT TRAIN—NEW ENGLAND
R. R. CO. V. CONROY, 20 SUP. CT. REP. 85.

No little confusion in the law governing the liability of a master for injuries caused by the negligence of fellow servants is cleared up by this decision, handed down in December by the United States Supreme Court. In general the rule adhered to by this court, following the current of authority in this country and England, has been that the master is not liable to the servant unless the servant whose neglect caused the injury is "one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department." *Northern P. R. Co. v. Peterson*, 162 U. S. 346. At the same time, however, the decision in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, in which it was held that an engineer could recover from the company for the negligence of the conductor of the train, on the ground that the latter is a vice-principal, though in conflict with the doctrine upheld in other cases, has never been overruled in terms.

The court now decides that it was overruled in effect by the case of *B. & O. R. Co. v. Baugh*, 149 U. S. 368, where a fireman was not allowed to recover from the company for injuries caused by the